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No. 90-815

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1990

JOSEPH A. BLAINE,

Petitioner,

vs.

MARTIN MARMOR AND GOLDIE MARMOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether or not Petitioner was denied due process when his original complaint was dismissed with prejudice upon concluding that he was a stranger to the note that was allegedly usurious for which he sought money damages.

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STATEMENT OF THE CASE AND FACTS

Petitioner, Blaine, initiated the action below by filing a single count complaint which sought to recover allegedly usurious interest. The interest that was allegedly usurious was paid pursuant to a promissory note executed by Helen Cutliff and secured by a mortgage on the New Willard Gardens Hotel, then owned by Helen Cutliff. As an attachment to his complaint, Blaine attached as Exhibit 1 a mortgage between Blaine and Cutliff, the then owner of the New Willard Gardens Hotel. As an Exhibit 2, he attached a contract between himself and Cutliff. That contract provided, *inter alia*, that Blaine had the right to manage and operate the New Willard Gardens Hotel and keep all the profits therefrom and was required to pay all the expenses of operation. Blaine's complaint asserted that because he made the mortgage payment of $825.00 per month as an operating cost of the hotel and because the interest was allegedly usurious under the promissory note that he should be entitled to sue for damages in the amount of double the interest payments pursuant to Fla. Stat. 687.04.

Respondents, Marmor, filed a Motion to Dismiss with Prejudice and asserted that the usurious nature of the note was already litigated between the real parties to the note and was therefore *res judicata*. (Resp.App.1) The Motion to Dismiss further asserted that Blaine had no standing to sue because he was a stranger to the note. A hearing was held before the trial court at which Blaine represented himself and the Respondents were represented through counsel. At that time, counsel for Marmor argued that the usurious nature of the note was already litigated by the real parties to the note in another

action in that same circuit. Upon hearing that, the trial judge determined that she needed to review the court file of that lawsuit to determine the validity of the *res judicata* argument and therefore reserved ruling for that purpose. Subsequently, the trial court entered an Order of Dismissal with Prejudice from which Blaine sought review. The Third District Court of Appeal affirmed per curiam and specifically found that Blaine was a stranger to the note and therefore could not sue thereunder. (Petitioner's App.1). Blaine sought rehearing from the Third District Court of Appeal which was denied. (Petitioner's App.3). Blaine sought *certiorari* from the Supreme Court of Florida which was denied. (Petitioner's Exhibit 2).

In order to properly understand the nature of the dispute, it is necessary to set forth the facts of prior litigation regarding the hotel and between the parties thereto.

In 1982, Helen Cutliff borrowed $55,000.00 from the Marmors and executed a promissory note for that sum secured by a mortgage on the New Willard Gardens Hotel. Thereafter, Cutliff defaulted under the note and Marmor filed a Mortgage Foreclosure Complaint. In that lawsuit, Cutliff filed an Answer and raised therein as an affirmative defense the usurious nature of the note. (Resp.App.3-4) The mortgage foreclosure action was resolved between the parties thereto, Cutliff and Marmor. A Final Consent Judgment of Foreclosure was entered by the trial court. When the amount of the judgment was not paid, Marmor was a successful bidder at sale and became the owner of the hotel.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition should be denied because the Petitioner Blaine was not deprived his due process as he asserts.

The Appellant would have this Court believe that he was denied due process rights which then becomes a federal question which would arguably confer jurisdiction upon this Court. However, a review of what happened below clearly establishes that the Defendant was afforded his due process rights. On September 21, 1988, the Petitioner was notified that a Motion to Dismiss had been filed. (Resp.App.1). It was not until December 20, 1988, that a hearing was held on the Motion to Dismiss. At that time, Blaine actually appeared and was heard in opposition of the Motion. Under such circumstances, the Appellant is hard pressed to assert that he was not afforded his due process rights. His claim can more accurately be stated by saying that three months is insufficient time in which to prepare to defend a simple Motion to Dismiss. Blaine chose not to retain counsel. That was his choice. The fundamental requirements of procedural due process under both the State of Florida and Federal Constitutions are reasonable notice and fair opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). In the case before the Court, there is not a scintilla of doubt as to whether Blaine received reasonable notice and reasonable opportunity to be heard.

After the trial court entered an Order dismissing the complaint with prejudice, Blaine decided to secure the services of competent counsel and was represented by Scott Greenfield, Esquire, in Florida's Third District Court

of Appeal and was represented by Damodar S. Airan, Esquire, in the *certiorari* proceeding before the Florida Supreme Court. Mr. Blaine had an opportunity to convince the trial court he was correct, the intermediate Appeal Court he was correct and the Florida Supreme Court he was correct. In all those proceedings, it was determined that his action should fail. Those decisions, based purely upon state law, are correct and this Court should decline to grant *certiorari* to review those state law determinations by state courts.

2. Blaine is a stranger to the note and as such has no standing to sue to recover payments that were allegedly usurious.

Blaine misstates the facts and misunderstands the law when he attempts to characterize himself as a third party beneficiary of the note and mortgage between Cutliff and Blaine. The note and mortgage between Cutliff and Blaine was between the two of them and only the two of them. If the payments were in violation of the usury statute, then the owner of the note and mortgage would have standing to make a claim for damages in double the amount of the interest payments pursuant to Fla. Stat. 687.04. The written contract between Cutliff and Blaine put those parties in the position of landlord and tenant. Cutliff owned the hotel and leased it to Blaine. The rent Mr. Blaine was to pay would be the amount of the mortgage payment so that Cutliff would have no carrying cost. Blaine absurdly mischaracterizes himself as the "real borrower" under the note and mortgage. In fact, Mr. Blaine is nothing more than a tenant paying $825.00 per month for rent. To characterize Blaine as anything

more would be grossly inaccurate. Blaine is not the promisor under the note, he is not the obligor under the note, he is not the real or substantial debtor under the note, he is not related to the note in any way, shape or form. Blaine is a total stranger to the note and upon breaching the note, would not be liable under the note and would not be a named defendant in a lawsuit to enforce the note. Under Florida Law, a stranger to the note may not sue to recover allegedly usurious payments. *Nesbitt v. Citicorp Savings*, 514 So.2d 371 (Fla. 3d DCA 1987). Florida's Third District Court of Appeal found that the record before it established, as a matter of fact, that Blaine was a "stranger to the note". (Pet. A-1). This Court affords respectful consideration and great weight to the views of a state's highest court on matters of state law and customarily accepts factual findings of state courts in the absence of exceptional circumstances. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed. 2d 233 (1980).

This Court has no supervisory jurisdiction over state courts and in reviewing a state court's judgment is confined to evaluating it in its relationship to the Federal Constitution. *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed. 2d 740 (1981).

In the case before the Court, Blaine strains to present a federal question to this Court to support this Court's exercise of *certiorari* jurisdiction. However, an application by a state court of state law does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon*, 65 L.Ed. 2d 106, 111 n.6, 447 U.S. 255, 100 S.Ct. 2138 (1980).

Lastly, the matter of the usurious nature of the note is *res judicata* in that that matter was already litigated and raised in the mortgage foreclosure action initiated by Blaine against Cutliff when Cutliff filed an Answer. and raised usury as an affirmative defense. (Resp.App.2).

CONCLUSION

The Petition for Writ of Certiorari should be denied or alternatively this Court should affirm the decision of the Court below.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 88-37201

FLORIDA BAR NO. 347612

JOSEPH A. BLAINE

Plaintiff

v.

MARTIN MARMOR and GOLDIE MARMOR

_____/

DEFENDANTS [sic] MOTION TO DISMISS WITH PREJUDICE

The Defendants, MARTIN MARMOR and GOLDIE MARMOR, by and through their undersigned attorney hereby file this, their Motion to Dismiss with Prejudice and would state as follows:

1. That the Plaintiff, JOSEPH A. BLAINE, is a stranger to the referenced note and therefore has no standing to file this Complaint alleging a usurious interest rate.

2. That the Plaintiff's cause of action is bared [sic] by the doctrine of res judicata as the alleged claim of usury on this same note has already been litigated in the case of *MARTIN MARMOR and GOLDIE MARMOR v. CHARLES MILLER, GWENDOLYN MILLER and HELEN CUTLIFF*, Case No. 83-38909 CA 23 in Dade Circuit Court.

That a final judgment was entered in that case and is currently up on appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to JOSEPH A. BLAINE, P.O. Box 364, Miami Shores, Florida 33153 on this 19 day of September, 1988.

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/s/ Sandor F. Genet
SANDOR F. GENET

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 83-38909 CA 23

MARTIN MARMOR and GOLDIE MARMOR, Plaintiffs, vs. CHARLES K. MILLER, GWENDOLYN M. MILLER, and HELEN CUTLIFF, Defendants.	ANSWER OF DEFENDANT, HELEN CUTLIFF

Defendant, HELEN CUTLIFF, files her answer and affirmative defenses and states as follows:

1. The allegations contained in Paragraph 1 are admitted.

2. The allegations contained in Paragraph 2 are denied.

3. Defendant is without knowledge of the allegations contained in Paragraph 3 and demands strict proof thereof.

4. The allegations contained in Paragraph 4 are denied.

5. Defendant is without knowledge of the allegations contained in Paragraph 5 and demands strict proof thereof.

6. The allegations contained in Paragraph 6 are denied.

7. Defendant is without knowledge of the allegations contained in Paragraph 7 and demands strict proof thereof.

8. Defendant is without knowledge of the allegations contained in Paragraph 8 and demands strict proof thereof.

AFFIRMATIVE DEFENSES

1. Plaintiff failed to fully fund the alleged promissory note which secured the alleged mortgage.

2. Plaintiff received interest upon the alleged promissory note in excess of the highest lawful rate.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 22nd day of February, 1984, to: DONALD G. CRISCUOLO, ESQ., GENET MILNER, Attorneys for Plaintiffs, 150 N.W. 168th Street, Suite 330, North Miami Beach, Florida 33169, and to: ROBERT SUMMERS, ESQ., SUMMERS AND MAKEMSON, P.A., Attorneys for Defendants, MILLERS, 200 Seminole Street, P.O. Box 538, Stuart, Florida 33494.

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BY: /s/ Paul M. Bauch
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Attorneys for Defendant,
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